

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ERNESTO DIAZ; LEE McNEIL,

Plaintiff,

v.

BAC HOME LOANS,

Defendant.

2:10-CV-1400-LRH-LRL

ORDER

Before the court is defendant BAC Home Loans Servicing, LP's ("BAC") motion to dismiss filed on August 25, 2010. Doc. #6.¹ Plaintiff Ernesto Diaz ("Diaz") filed an opposition (Doc. #9) to which BAC replied (Doc. #10).

I. Facts and Procedural History

Diaz purchased real property through two loans secured by a deed of trust with non-party Countrywide Home Loans. In June 2009, Diaz defaulted on his loan obligations. Thereafter, non-moving defendants initiated non-judicial foreclosure proceedings.

After non-judicial foreclosure proceedings were initiated, Diaz contacted BAC in November 2009, seeking a loan modification through BAC's home retention program. BAC requested Diaz provide various documentation to determine if a loan modification was possible.

¹ Refers to the court's docketing number.

1 While BAC was reviewing Diaz's request for a loan modification, the property was sold at auction
2 on July 14, 2010.

3 Subsequently, Diaz filed a complaint alleging five causes of action: (1) promissory
4 estoppel; (2) wrongful foreclosure; (3) fraudulent misrepresentation; (4) permanent injunction; and
5 (5) quiet title. Doc. #1. Thereafter, BAC filed the present motion to dismiss. Doc. #6.²

6 **II. Legal Standard**

7 In considering "a motion to dismiss, all well-pleaded allegations of material fact are taken
8 as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v.*
9 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court
10 does not necessarily assume the truth of legal conclusions merely because they are cast in the form
11 of factual allegations in a plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752,
12 754-55 (9th Cir. 1994).

13 There is a strong presumption against dismissing an action for failure to state a claim. *See*
14 *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "The issue is
15 not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence
16 in support of the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other*
17 *grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). However, a plaintiff's obligation to
18 provide the grounds of his entitlement to relief requires more than labels, conclusions, and a
19 formulaic recitation of the elements of the cause of action. *Bell Atlantic Corp. v. Twombly*, 127 S.
20 Ct. 1955, 1965 (2007). "Factual allegations must be enough to raise a right to relief above the
21 speculative level on the assumption that all the allegations in the complaint are true (even if
22 doubtful in fact)." *Id.* (internal citations omitted).

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25 ² BAC also filed a motion for oral argument on its motion to dismiss. Doc. #12. The court finds that the
26 pleadings are sufficiently briefed and that oral argument is unnecessary at this time. Accordingly, the court shall
deny BAC's motion for a hearing.

1 **C. Fraudulent Misrepresentation**

2 “In alleging fraud or mistake, a party must state with particularity the circumstances
3 constituting fraud or mistake.” FED. R. CIV. P. 9(b). In order to meet the heightened pleading
4 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well
5 as the names of the parties involved. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th
6 Cir. 1999); *see also, Parnes v. Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a
7 plaintiff to allege the requisite who, what, where, when, and how of the misrepresentation). Here,
8 plaintiffs fail to allege anything more than defendants made misrepresentations to them. These
9 allegations are insufficient to support a claim for fraudulent misrepresentation.

10 In his complaint, Diaz alleges that he was told by multiple BAC employees that his
11 requested loan modification was in review and was being worked on during the foreclosure
12 process. Further, Diaz alleges that one BAC employee in particular, a Regina, told him on July 7,
13 2010, that she would request a postponement of the foreclosure sale on his behalf. Thus, Diaz
14 argues that BAC employees made fraudulent misrepresentations that the foreclosure sale would not
15 proceed on July 14, 2010.

16 The court has reviewed the documents and pleadings on file in this matter and finds that
17 these allegations are insufficient to support a claim for fraudulent misrepresentation that the
18 foreclosure sale would not proceed. Initially, the court notes that nowhere in the complaint does
19 Diaz allege that he was told by any BAC representative that the pending foreclosure sale was, or
20 would be stayed, while BAC worked on his requested loan modification. Further, there are no
21 allegations that he was actually told by Regina or any other BAC employee that the foreclosure
22 sale had in fact been postponed. Finally, the loan modification documents provided to Diaz
23 throughout the review process provide that collection efforts and foreclosure proceedings would
24 not cease during the modification evaluation. Therefore, the court finds that Diaz has failed to state
25 a claim for fraudulent misrepresentation related to the July 14, 2010 foreclosure sale.

1 **D. Permanent Injunction**

2 A permanent injunction is a remedy that may be afforded to a party after he has sufficiently
3 established and proven his claims; it is not a separate cause of action. Here, Diaz's claims fail to
4 establish a claim for relief. Accordingly, Diaz is not entitled to declaratory relief or a permanent
5 injunction.

6 **E. Quiet Title**

7 Under Nevada law, a quiet title action may be brought by someone who claims an adverse
8 interest in property. NRS 40.010. BAC has no interest in the property that is adverse to Diaz.
9 Therefore, Diaz has no grounds to quiet title against BAC.

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11 IT IS THEREFORE ORDERED that defendant's motion to dismiss (Doc. #6) is
12 GRANTED. Plaintiff's complaint is DISMISSED.

13 IT IS FURTHER ORDERED that defendant's motion for a hearing (Doc. #12) is DENIED.

14 IT IS SO ORDERED.

15 DATED this 28th day of October, 2010.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE